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The CASE of the Earl of *Selkirk* Respondent. To the Petition and Appeal of Sir *James* *Gray*, from a Decree of the Lords of } Appellant. Council and Session in *Scotland*.

12. March, 1702, 3. **T**He Duke of *Hamilton* borrow'd of Captain *Alexander Gawin* at *London*, 1000 *l.* and gave him a Bond of 2000 *l.* penalty for payment of 1030 *l.* on the 13th of *September* 1703. At the same time Captain *Gawin* was Indebted to the Earl of *Selkirk* in several Thousand pounds.

19th July, 1704. Captain *Gawin* being then as is pretended, Indebted to the Appellant Sir *James Gray* in 1500 *l.* assign'd over the Duke's Bond to the Appellant, in part of Satisfaction of that Debt, and also assign'd to him other Securities to the value of 2 or 3000 *l.*

After this pretended Assignment, Captain *Gawin* wrote to the Duke for, and received from him two Years Interest, due to 13th *March* 1704, 5, and farther requested the Duke to pay him 200 or 300 *l.* part of the principal Money.

11th Sept. 1705. Sir *James Gray* by Letter, gives notice to the Duke, of his having obtained from *Gawin* an Assignment of the Duke's Bond, at which the Duke was surpris'd; yet returned an Answer, that he had paid two Years Interest of the 1000 *l.* and would continue punctual payment of the Interest, and pay the Principal as soon as he could.

14th June, 1706. The Earl of *Selkirk*, who was so great a Creditor of *Gawin*, as is mentioned above, getting Notice of the Debt due from the Duke to *Gawin*, and that there was no legal Assignment of it to any other person, procured an Arrest or Attachment of all Money of the said *Gawin* in the Hands of the Duke, and of the Appellant, to be made according to the Laws of *Scotland* towards satisfaction of his own Debt.

25th June 1706. Capt. *Gawin* and Sir *James Gray* caused the Original Bond from the Duke, and *Gawin*'s Assignment of it, to be Registered in the Books of Council and Session in *Scotland*, in order to avoid that Arrest, and to recover the Debt by the Laws of *Scotland*, if there should be occasion to Sue for it.

But Sir *James Gray* did not take care to have that Assignment intimated according to the Formalities required by the Laws of *Scotland*, to make it valid against the Debtor himself, or the Creditors of the first Obligee.

Capt. *Gawin* and Sir *James Gray*, being sensible that they had not pursued the Law of *Scotland* in the Assignment of the Duke's Debt, Sir *James Gray* apply'd to the Duke for a Bond of Corroboration of the former Bond, and for payment of the 1000 *l.* with Interest at several Days, in several Years past, and yet to come, which the Duke consented to, being Indemnify'd against the said Arrest or Attachment.

31st March 1707. Accordingly the Duke gave such Bond of Corroboration, and Sir *James Gray* gave a Bond to the Duke, that he would procure a Decree of the Lords of Session for the Duke's payment of the Money to Sir *James Gray*, and to save the Duke harmless from the said Arrest or Attachment.

Pursuant to this Bond, *Gawin* and Sir *James Gray* raised a Process, or commenced a Suit in the Name of Sir *James Gray*, against the Duke before the Lords of Council and Session in *North-Britain*.

In this Suit the Earl of *Selkirk*, according to the *Scotch* Laws, appeared for his Interest, and crav'd a Decree for payment of the Money to him as a real Creditor of *Gawin*, and who was entitled to it by the Arrest or Attachment of it, which by the Law of *Scotland*, amounted to a legal Assignment, preferable to all other Assignments not legally and formally intimated or signify'd to the Duke according to that Law.

This Cause came to be heard in the Outer Court before one Lord of the Session, as the usage is there, when it was urg'd on behalf of Sir *James Gray* the now Appellant, that the Duke's Bond to *Gawin* being made in *England* in the *English* Form, and assign'd in the *English* Form to the Appellant, and Notice of it given to the Duke and own'd by him, the Law of *England*, which requires no certain Form of Intimation, ought to govern this Case, and that the Assignment to Sir *James Gray* being prior in time, ought to be preferred to the Earl of *Selkirk*'s Arrest or Attachment of the Money, and the single Lord of Session Decreed accordingly.

The Earl of *Selkirk* removed the Cause before the whole 15 Lords of Council and Session, where the same Arguments were urg'd for Sir *James Gray*; but the whole Bench (whereof the Lord who pronounced the Decree in the Outer Court was one, and chang'd his Opinion) after a full Debate, unanimously Declared and Decreed, that Sir *James Gray* having made his Election to prosecute his Action before a *Scotch* Judicature, had submitted it to the Law of *Scotland*, which requires an Assignment in a particular manner prescribed as Essential to compleat the Right of the Assignee, and makes the Assignments void, where there is the least variation from this Form, and that the Duke's private Letters could not supply the Defect of such legal Intimation, nor be admitted to invert the Order of preferring Creditors establish'd by the Law, especially in prejudice of a 3d party (as the Earl of *Selkirk* is) acting by Law, and under a legal Assignment, viz. An Arrest or Attachment which being executed according to the *Scotch* Law, is equal to an Assignment in Writing, and therefore Decreed the Duke to pay the Money to the Earl of *Selkirk*, and discharged the Duke from the Appellant's Process.

From this Decree of the Lords of Council and Session in *Scotland*, Sir *James Gray* hath appealed to the Lords of the Parliament of *Great-Britain*, and insists that the Attachment made by the Earl of *Selkirk* of this Debt in the Hands of the Duke of *Hamilton*, as a Debt owing to Capt. *Gawin* after the said Debt had been assigned by *Gawin* to Sir *James Gray*, and Notice thereof given by Sir *James Gray* to Duke *Hamilton*, is void.

But the Respondent humbly insists, that the said Decree is just and agreeable to the Laws of *Scotland*, for that by the Laws of *Scotland*, an Assignment of a Debt ought to be intimated formally to the Debtor, by reading it over to him before a Notary-Publick and Witnesses; which Witnesses, by an Act of Parliament made in 1681. are to be named in the Body of the Intimation, and subscribing the same; and that in default thereof, the Assignment is void against a 3d person, and the Attachment by a real Creditor of the Assignor before such Intimation, gives him a legal Interest in such Debt, and is equal by the Laws of *Scotland* to a valid Assignment, for which Reason, the Respondent having attach'd the said Debt before the Assignment was duly intimated, ought, as he conceives, to be preferred before the Assignee, and therefore humbly hopes your Lordships will affirm the said Decree, and dismiss the Appeal with Costs.

John Pratt. Dugal Stuart.